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No. 101

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In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM VINCENT VITARELLI, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, HARRIS ELLSWORTH, CHAIRMAN OF THE CIVIL SERVICE COMMISSION OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The order of the United States District Court for the District of Columbia (R. 37–38) is not reported. The opinions of the Court of Appeals for the District of Columbia Circuit (R. 38–45) are reported at 253 F. 2d 338.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958 (R. 46). On May 5, 1958, by order of the Chief Justice, the time to file a petition for a writ of certiorari was extended until June 13,

1958 (R. 47). The petition for a writ of certiorari was filed on June 12, 1958, and granted on October 27, 1958 (R. 48). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner's removal from a non-sensitive position in the Department of Interior, on September 10, 1954, was erroneously based upon the Act of August 26, 1950, and Executive Order 10450. Subsequent to his removal, and following this Court's decision in *Cole* v. *Young,* 351 U.S. 536, the Civil Service Commission expunged from its records all adverse findings under Executive Order 10450 and the Department of Interior issued a new "Notification of Personnel Action" which reflects that petitioner's employment was terminated on September 10, 1954, but contains no reference to Executive Order 10450. Petitioner was admittedly not entitled to the benefits of the Lloyd-LaFollette Act or the Veterans' Preference Act of 1944.

The question presented is whether, in the light of these circumstances, petitioner is now entitled to a judicial determination that he was wrongfully discharged from his employment and to a judicial direction that he be reinstated in his former position.

STATUTE, EXECUTIVE ORDER AND REGULATION INVOLVED

The Act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22–1, 22–3), Executive Order 10450, issued April 27, 1953 (18 Fed. Reg. 2489), and Department of the Interior Order No. 2738, dated November 9, 1953, are

set forth, in pertinent part, in the Appendix, *infra*, pp. 27–45.

STATEMENT

On September 10, 1952, petitioner, a non-veteran, was appointed by the Department of Interior, Office of Territories, as an Education and Training Specialist on the Pacific Island of Koror (R. 25–26). Since this position was within Schedule A of the Civil Service regulations (5 C.F.R. 6.101(h)) and therefore excepted from the classified civil service, petitioner's appointment did not confer upon him civil service status (R. 25–26). Rather, petitioner signed an agreement to serve in his employment for twenty-four months, "or such part thereof as [his] services may be needed" (R. 27–29).

On April 2, 1954, petitioner was suspended from his employment and served with written charges by the Secretary of the Interior pursuant to the Act of August 26, 1950, 64 Stat. 476, 5 U.S.C. 22–1 (*infra*, pp. 27–29),[1] and Executive Order No. 10450 (18 Fed. Reg. 2489) (*infra*, pp. 30–40), as implemented by the Department of the Interior Order No. 2738 (R. 3–6) (*infra*, pp. 40–45). The charges, in substance, were that petitioner during the years 1941 to 1945 was either a member of, affiliated with, or in sympathetic association with, the Communist Party and members of the Communist Party (R. 3–5); that petitioner's "behavior, activities and associations tend to show

[1] The Act of August 26, 1950, was made applicable to the Department of Interior by Executive Order No. 10450 (see *infra*, p. 30).

that [he is] not reliable or trustworthy," that there was reason to believe that petitioner had "deliberately misrepresented, falsified or omitted material facts in connection with [his] behavior, activities and associations", and that there was reason to believe that petitioner "may be subjected to coercion, influence, or pressure which may cause [him] to act contrary to the best interests of national security" (R. 5–6). Petitioner was advised of his right to submit any statements, answers, or affidavits to the Secretary of Interior to show why he should be reinstated or restored to duty. He was also advised that he could request a hearing before a board constituted for that purpose and that the Secretary of Interior would review and consider his statements, answer and affidavits and the recommendation of the hearing board if a hearing were requested, whereupon he would be notified of the Secretary's decision either to terminate his employment as "necessary and advisable in the interests of the national security of the United States," or to reinstate him in his former employment (R. 6).

Petitioner subsequently filed with the Secretary of Interior a written answer, together with 44 affidavits concerning his loyalty and character. On June 11, 1954, petitioner was advised that his answer and supporting affidavits did not constitute sufficient grounds to reinstate him (R. 10, 20, 30).

On June 22 and July 1, 1954, petitioner, together with counsel, appeared before a hearing board consisting of three disinterested employees of agencies other than the Department of Interior (R. 10, 20,

30). Based upon the entire record in petitioner's case, the hearing board on August 26, 1954, recommended "that the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security" (R. 30).

On September 2, 1954, the Secretary of Interior found it "advisable and necessary that the employment of [petitioner] should be terminated in the interest of national security for the reasons specifically set forth in the letter of charges dated March 30, 1954" (R. 30). The Secretary, therefore, determined and ordered "that the employment of [petitioner] * * * be, and the same is hereby, terminated in the interest of the national security at the close of business on September 10, 1954." On October 25, 1955, petitioner applied for reinstatement or rehearing. This application resulted in the taking of certain testimony on November 14, 1955. The application was however denied by the Secretary on May 11, 1956.

On June 11, 1956, this Court rendered its decision in *Cole* v. *Young*, 351 U.S. 536, holding that the Act of August 26, 1950, and Executive Order 10450 were inapplicable to a non-sensitive position such as had been held by petitioner. On June 12, 1956, petitioner made written demand upon the Secretary "to restore him to duty forthwith in accord with the decision of the Supreme Court in *Cole* v. *Young* * * *" (R. 12). The Secretary did not comply with this demand (R. 12).

On July 10, 1956, petitioner instituted this action against the Secretary of the Interior and the Civil

Service Commissioners, seeking (1) a declaratory judgment that his discharge was illegal; and (2) a mandatory injunction directing reinstatement, back-pay and the expunging of all records pertaining to petitioner's discharge (R. 7–18). Following the commencement of this action, the Civil Service Commission expunged from its records "all adverse findings made with respect to [petitioner] under Executive Order 10450" (R. 34). The Department of Interior, in place of an official termination notice dated September 21, 1954 reflecting that the petitioner's termination was "taken in accordance with the provisions of Executive Order 10450" (R. 32), substituted a new notice of termination dated September 21, 1954, which contained no reference to Executive Order 10450, but which states that it "is a revision of and replaces the original bearing the same date" (R. 33–34).

On cross-motions for summary judgment, the District Court dismissed the complaint (R. 37). In its order, the court noted that respondents concede that the removal of petitioner as a "security risk" was not authorized by the Act of August 26, 1950; and that respondents had "taken all practical steps, short of reinstating plaintiff or giving him back pay, to remove the stigma, if any, which may have resulted from his removal by expunging from [his] records * * * all adverse statements with respect to plaintiff as a 'security risk' under Executive Order 10450" (R. 37). Further, the court's order recites that the position to which petitioner seeks reinstatement "was and is a 'Schedule A' position, which is excepted

from the competitive civil service and from which plaintiff could be summarily removed with or without cause under the general authority of the executive branch to appoint and remove employees excepted from the competitive civil service; and that this Court cannot order the reinstatement of plaintiff, whose tenure, as a 'Schedule A' employee, is only at the will of the employing Government; * * *'" (R. 37).

The Court of Appeals affirmed, Fahy, J., dissenting (R. 38–45). It held that the security risk discharge procedures provided by the Act of 1950, Executive Order No. 10450, and Departmental Order 2738, were prescribed for the discharge of employees in sensitive positions who normally would be entitled to even greater procedural protection under other statutes such as the Lloyd-LaFollette or Veterans' Preference Acts (R. 40–41). However, since petitioner was not a veteran nor otherwise protected in the tenure of his employment, he was subject to summary dismissal and therefore not entitled to the benefit of the Act of 1950 and the Executive Order implementing it (R. 41). At most, he was entitled not to be discharged for "flagrantly arbitrary" or unconstitutional grounds, and dismissal as a security risk was neither "flagrantly arbitrary" nor unconstitutional *per se* (R. 41). Moreover, the procedure utilized by the Secretary, including formal written charges, an opportunity for petitioner to answer, and a hearing at which he was represented by counsel and presented witnesses, afforded petitioner due process (R. 41–42). Therefore, although the Secretary erred in citing the

Act of 1950 and the implementing Executive Order as the authority for the discharge proceedings, the discharge was nevertheless valid (R. 42–43). One of the grounds for dismissal—that petitioner was "not reliable or trustworthy" and had "deliberately misrepresented * * * material facts"—furnished an adequate basis for dismissal regardless of the questions raised concerning the security discharge procedures (R. 43–44). The court also noted that respondents had already afforded petitioner the full relief to which he would be entitled even if the 1954 discharge were invalid (R. 44). In this connection, it pointed out that the Civil Service Commission had voluntarily expunged its records of findings that petitioner was a security risk, and that the Department of the Interior had substituted a second termination notice which omitted all reference to discharge for security reasons (R. 44).

SUMMARY OF ARGUMENT

Petitioner complains of his removal from a position in government employment which he occupied only at the will of the appointing authority and without statutory protection as to tenure or as to procedures for dismissal. No pertinent regulation of the Department of Interior was violated by petitioner's removal, and the record as it now stands is free of any indication that petitioner was removed as a security risk. In these circumstances, no judicial relief can properly be accorded petitioner on account of his removal from his post and the courts below were correct in so holding.

I

A. The role of the courts in reviewing dismissals of employees in the executive branch is a limited one, confined to a determination of whether there has been compliance with procedural requirements of statutes or regulations, or whether the removing authority has exceeded the bounds of its authority, or whether there has been an invalid discrimination prohibited by the Constitution. Petitioner, because of his unprotected status in government employment, has no basis for judicial complaint; he was at all times subject to dismissal for cause or for no cause, without notice or hearing, and without need for assignment of reasons. Apart from the Act of August 26, 1950, no statute is claimed to have limited the Departmental power of removal, and there was clearly no discrimination forbidden by the Constitution.

B. 1. The Act of August 26, 1950 (involved in *Cole v. Young*, 351 U.S. 536), and the Department of Interior security regulations, did not confer upon petitioner any procedural or substantive rights against removal. The purpose of the Act and the regulations was to facilitate the removal by summary procedures of employees of the Government who were subject to such legislation as the Lloyd-LaFollette Act or the Veterans' Preference Act. Petitioner did not come within that class; he was protected by no legislation.

2. But even if the procedures prescribed by the Act of 1950 were applicable to petitioner, they were complied with. He was given a written statement of the charges against him; he submitted an answer, with supporting affidavits, to the charges; he was given

a hearing and, after deliberative consideration by the Secretary of Interior, was given written notification of the reason for his dismissal. He was, therefore, given the benefit of the statutory and regulatory procedures prescribed for removing employees in sensitive positions who were protected by the Lloyd-LaFollette or Veterans' Preference Acts. This was more than his due, and he cannot complain that these procedures were inadequate.

3. Because petitioner was not entitled to any procedural protection and was given procedural benefits to which he was not legally entitled, this case does not present any serious question of procedural due process. Even if there be some residue of procedural due process for employees without statutory or regulatory protection in their employment, that measure was accorded petitioner by reason of the written notification of charges, the opportunity to answer, and the hearing which preceded his termination.

C. Concededly, because of the non-sensitive character of his position with the Department of Interior, petitioner's removal was not authorized by the Act of August 26, 1950. It does not follow, however, that his discharge was invalid. As we have pointed out, no statute or regulation was violated. Wholly apart from the 1950 Act, the Secretary of Interior had unfettered authority to remove petitioner from his employment. That removal, sustainable under the Secretary's plenary power, is not rendered invalid because the Secretary erroneously relied upon the supposed authority of the 1950 Act, particularly since reference to the

1950 Act and Executive Order 10450 have now been expunged from the records.

II

Respondents have expunged from their records adverse findings and references with respect to petitioner's removal. Petitioner has therefore obtained all the relief which a court might have been justified in granting in his case. *E.g., Peters* v. *Hobby,* 349 U.S. 331, 349. Since none of his procedural or substantive rights were violated by the removal itself, there is no basis for invalidating that removal, and consequently petitioner has no right to reinstatement. And even if his 1954 discharge were held to be invalid, his employment was effectively and validly terminated in 1956 by reason of the "Notification of Personnel Action" issued by the Department of Interior, giving no reason for petitioner's termination and withdrawing the prior notification. For this additional reason, there is no present right to reinstatement.

ARGUMENT

Petitioner concedes that, since he occupied a Schedule A position excepted from the classified civil service, the procedural benefits of the Lloyd-LaFollette Act[2] are not applicable to him (Pet. Br. 14, 16, 32). Similarly, it is admitted that he is not a veteran and therefore is not entitled to the procedural benefits of the Veterans' Preference Act of 1944.[3] And since the position from which he was removed had not been designated

[2] Section 6, 37 Stat. 555, as amended, 5 U.S.C. 652.

[3] Section 14, 58 Stat. 390, as amended, 5 U.S.C. 863.

as sensitive, the procedure prescribed by the Act of August 26, 1950,* and Department of Interior Order No. 2738 had no valid application to him. *Cole* v. *Young*, 351 U.S. 536. Thus, petitioner complains of his removal from a position in government employment which he occupied only at the will of the appointing authority, and without statutory protection either as to tenure or as to procedures for dismissal. Moreover, no pertinent regulation of the Department of the Interior was violated by petitioner's removal, and the record as it now stands is free of any indication that he was regarded as a security risk.

In these circumstances, we submit that no judicial relief can properly be accorded petitioner on account of his removal from his post, and that the courts below were correct in so holding.

I

PETITIONER'S REMOVAL FROM FEDERAL EMPLOYMENT WAS VALID BECAUSE NOT IN VIOLATION OF ANY STATUTE, EXECUTIVE ORDER, OR REGULATION

A. *In the absence of a violation of procedural rights or of clear discrimination, a court may not invalidate the dismissal of a Government employee.*

Measured by the traditional standards of judicial review in personnel removal cases, the role of the courts in reviewing dismissals of employees in the executive branch is a limited one, confined to a determination of whether there has been compliance with procedural requirements of statutes or regulation, or

* 64 Stat. 476, 5 U.S.C. 22–1.

whether the removing authority has exceeded the bounds of its authority, or whether there has been an invalid discrimination. *E.g.*, *Eberlein* v. *United States*, 257 U.S. 82; *Burnap* v. *United States*, 252 U.S. 512; *Reagan* v. *United States*, 182 U.S. 419; *Keim* v. *United States*, 177 U.S. 290; *Green* v. *Baughman*, 243 F. 2d 610, 613 (C.A.D.C.); *Hargett* v. *Summerfield*, 243 F. 2d 29, 32 (C.A.D.C.); *Saggau* v. *Young*, 240 F. 2d 865 (C.A.D.C.); *Ellmore* v. *Brucker*, 236 F. 2d 734, 736–7 (C.A.D.C.); *Smith* v. *Dulles*, 236 F. 2d 739, 742 (C.A.D.C.); *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A.D.C.); *Kegton* v. *Anderson*, 229 F. 2d 519 (C.A. D.C.); *Williams* v. *Cravens*, 210 F. 2d 874 (C.A.D.C.); *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A.D.C.); *Blackmon* v. *Lee*, 205 F. 2d 13 (C.A.D.C.); *Terry* v. *Stevens*, 203 F. 2d 219 (C.A.D.C.). See also the Government's brief in *Greene* v. *McElroy*, No. 180, this Term, at pp. 36–40, 41–43.

This limited inquiry of the courts is, of course, founded upon the basic constitutional proposition that the powers of appointment and removal of executive employees are vested in the executive and legislative branches of the Government. Article II, Secs. 2, 3 of the Constitution; *Myers* v. *United States*, 272 U.S. 52; *Wiener* v. *United States*, 357 U.S. 349. And where, as in this case, the appointive and removal authority are subject exclusively to the discretion of the executive unfettered by statutory or self-imposed limitations, the courts "can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal"—at least in the absence of

a plainly unconstitutional discrimination. *Matter of Hennen,* 13 Pet. 230, 261.

The recent decisions of this Court in employee removal cases accord with this limited function of the judiciary in matters of federal personnel administration. In *Peters* v. *Hobby,* 349 U.S. 331, the Court's inquiry was whether the action of the Loyalty Review Board of the Civil Service Commission was in violation of the Executive Order from which the Board's authority was derived; in *Cole* v. *Young,* 351 U.S. 536, the issue was whether the Act of August 26, 1950 and Executive Order 10450 authorized the removal of an employee in a non-sensitive position subject to the Veterans Preference Act; in *Service* v. *Dulles,* 354 U.S. 363, the inquiry was whether the Secretary of State had complied with State Department regulations applicable to the removal of security risks. And, as pointed out in the Government's brief in No. 180, *Greene* v. *McElroy,* at pp. 36–39, the *Public Workers—Wieman—Slochower* line of cases[5] concern unconstitutional substantive discrimination, rather than procedural rights.

Unless, therefore, petitioner could point to some statute, executive order, or regulation which restricted the plenary authority of the Secretary of the Interior to remove him—or unless he could prove that his removal was unconstitutionally discriminatory—this suit would necessarily have to fail. Admittedly, no legislation protected petitioner or afforded him rights as a

[5] *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100; *Wieman* v. *Updegraff,* 344 U.S. 183; *Slochower* v. *Board of Education,* 350 U.S. 551.

federal employee; and he plainly has no basis for claiming that the Interior Department discriminated against him on any substantive ground forbidden by the Constitution. In the next section of this brief, we shall show that he cannot rely on any regulation or executive order. In short, he was at all times subject to dismissal for cause or for no cause, without notice or hearing, and without need for assignment of reasons.

B. *Petitioner has no valid basis for complaining of the procedures which were employed to dismiss him*

1. Relying upon *Service* v. *Dulles,* 354 U.S. 363, petitioner argues that, since the Interior Department promulgated security regulations (App. *infra,* pp. 40–45) pursuant to Executive Order 10450, petitioner could be removed from his employment only pursuant to those regulations (Pet. Br. 24–25). The argument is without merit. In *Service* v. *Dulles,* the Secretary of State, by reason of State Department regulations, bound himself to comply with those regulations even where his removal authority was exercised in reliance on the so-called McCarran rider which gave him full power of removal. This case, however, is significantly different in that Interior's regulations were confined in their application to security removals under the authority of Executive Order 10450 and the Act of 1950, and did not (and were not intended to) delimit the otherwise plenary authority of the Secretary to dismiss an employee, such as petitioner, whose employment was subject to neither the Lloyd-LaFollette Act or the Veterans' Preference Act.

The purpose of the 1950 Act, the Executive Order, and Interior's own security regulations was not to expand the procedural rights of employees without any tenure, such as petitioner; on the contrary, it was the plain purpose of the 1950 Act to narrow the procedural rights of protected employees in order to facilitate their removal, by summary procedures, in the interest of national security. This view of the 1950 Act is clear from its history[6] and from its text which provides (5 U.S.C. 22–1, App., *infra*, p. 27) that "notwithstanding the provisions of [the Lloyd-LaFollette Act] or the provisions of any other law" the named department heads may "in the interest of national security" effect the removal of any employee. Removals under the 1950 Act were subject to the "absolute discretion" of the removing authority, subject to such procedural limitations as the "agency head determines that the interests of national security permit" (*ibid*).

In these circumstances, it is wholly fallacious to argue, as does petitioner, that the Act of 1950 or the implementing regulations of the Department of Interior conferred, or were intended to confer, special procedural rights upon employees not protected by the Lloyd-LaFollette Act, the Veterans' Preference Act, or any other law. Particularly with respect to those employees not governed by the 1950 Act—as has

[6] "The purpose of the bill is to *increase* the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action." (Emphasis added.) S. Rept. No. 2158, 81st Cong., 2d Sess., p. 2.

now been authoritatively held for one in petitioner's non-sensitive position—would it be anomalous to hold that the Department nevertheless bound itself to accord them more procedural rights than the rights to which they would otherwise be entitled.

2. But even if the procedures prescribed by the Act of August 26, 1950, and by Department of Interior Order No. 2738 (App. *infra*, pp. 27–29, 40–45), were applicable to him, petitioner would have no justifiable basis for complaint. In compliance with the Act and Section 15(a) of Interior's regulations, petitioner was given "a written statement of charges" (App. *infra*, p. 42) and advised of his privilege to "submit affidavits and statements and to answer such charges" (App. *infra*, pp. 42–43). In accord with the Act and with the regulations (App. *infra*, pp. 27–28, 42–43), he was advised of his right to, and (at his request) was given, a hearing before a duly constituted board convened for that purpose by the Secretary of the Interior. Following the hearing at which petitioner was present, was represented by counsel, and presented witnesses on his behalf, the Board determined and recommended to the Secretary that petitioner's employment "is not clearly consistent with the interests of national security" (R. 30). Again, in compliance with the Act and the Departmental regulations (App. *infra*, pp. 28, 45), the Secretary and others within the Department reviewed peti-

[7] The regulatory procedures prescribed by Department of Interior Order No. 2738 do not differ in any material respect from the procedures prescribed by the statute. See App. *infra*, pp. 27–30, 40–45.

tioner's case and determined that his employment should be terminated "in the interest of the national security" (R. 30) "for the reasons specifically set forth in the letter of charges dated March 30, 1954" (R. 30). As prescribed by the Act and the regulations (App. *infra*, pp. 28, 43), petitioner was thereupon given a "written statement of the decision of the [Secretary of Interior]; (R. 29–31). In the light of this record, it is clear that petitioner was given the benefit of the statutory and regulatory procedures prescribed for persons in sensitive positions who were protected by other federal personnel legislation. This was more than his due, and he cannot complain that these procedures were inadequate.

3. Since petitioner was not legally entitled to any procedural protections and was, in fact, given procedural benefits to which he was not legally entitled, this case does not present any serious question of procedural due process. We do not concede that federal employees left unprotected by statute and regulation are entitled by the Constitution to any procedural protections against summary removal. See the discussion in the Government's brief in *Greene* v. *McElroy*, No. 180, at pp. 39–40, 41–43, and *supra*, pp. 12–14. But even if there be some residue of procedural due process for such employees-at-will, that measure was accorded here. The charges against petitioner (R. 3–5) were, on their face, specific enough to inform him of the nature of the information which prompted his suspension and finally his dismissal. Cf. *National Labor Relations Board* v. *Mackay*, 304 U.S. 333; *Moog Industries* v. *Federal*

Trade Comm'n, 238 F. 2d 43 (C.A. 8); *Bailey* v. *Richardson*, 182 F. 2d 46, 58 (C.A.D.C.), affirmed by an equally divided Court, 341 U.S. 918. Moreover, the record in this case, since it does not include petitioner's answer to the charges or the 44 affidavits he submitted in response to the charges (R. 10, 20), affords no basis for inferring that petitioner, in his written refutation of the charges, was so prejudiced for want of sufficient information or for lack of disclosure of the Government's sources of its derogatory information as to be wholly at sea. And the generalities which assertedly inhere in Paragraph 3 (R. 5–6) of the charges (Pet. Br. 25–27) cease to be so general when read in conjunction with the specific allegations of fact (R. 3–5) to which Paragraph 3 refers and upon which the charges in Paragraph 3 were based. As the Court of Appeals held (R. 42):

> * * * And the treatment accorded appellant [petitioner] was in no way arbitrary, or lacking in due process. He was given written charges, and an opportunity to answer them, together with a hearing. This was more than he was entitled to under any statute or regulation applicable to persons of his employment status.

C. *The erroneous belief by the Secretary of Interior that the Act of 1950 and Executive Order 10450 governed petitioner's removal does not invalidate his dismissal*

It is and has been conceded that, because of the nonsensitive character of his position with the Department of Interior, petitioner's removal on security grounds was not authorized by the Act of August 26,

1950, or Executive Order 10450 (App. *infra*, pp. 27–40). It does not follow, however, that because the Secretary erroneously relied upon these supposed authorities petitioner's discharge was invalid—if, as we have shown, it was otherwise lawful. In *Cole* v. *Young*, 351 U.S. 536, the discharge was unauthorized by the 1950 Act, but the Court's decision that the discharge was invalid was based upon the fact that the discharge was accomplished in violation of Section 14 of the Veterans' Preference Act to which that employee was subject. 351 U.S. at 543, 557–558. As we have stressed, petitioner's discharge entailed no such violation.

Similarly, in *Service* v. *Dulles*, 354 U.S. 363, the invalidity of the employee's removal was predicated upon the Secretary of State's violation of State Department regulations, and the failure of the Secretary of State to accord Mr. Service the procedural benefits of the Foreign Service Act to which his employment was subject. 354 U.S. at 371, n. 12.[8] Again, these are considerations unrelated to petitioner's case.

Clearly, neither *Cole* v. *Young* nor *Service* v. *Dulles* provides authority for invalidating petitioner's removal. In neither case did the Court decide that loyalty or security considerations are not a valid ground for removing federal employees; and in neither case did the Court hold that employees who are unprotected by statute or regulation cannot be dismissed summarily, at will. In the *Service* case, the controlling inquiry was one addressed to the procedural regularity of the removal under the gov-

[8] 58 Stat. 390, as amended, 5 U.S.C. 863.

[9] See also, *Peters* v. *Hobby*, 349 U.S. 331, where the removal and debarment involved were effected by the Loyalty Review

erning regulation (354 U.S. at 373, 382–389); and in *Cole,* the Court was careful to note that "there [was] no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee *can* be dismissed on such grounds but only the extent to which the summary *procedures* authorized by the 1950 Act are available in such a case." 351 U.S. at 544.

While the original notification of petitioner's removal cited as authority the 1950 Act and Executive Order 10450, "it is important to note that that Act is not the only, nor even the primary, source of authority to dismiss Government employees." *Cole* v. *Young,* 351 U.S. 536, 543. Though petitioner's removal was not authorized by the 1950 Act, his dismissal—as distinguished from the notice of the dismissal—must nevertheless be sustained as a valid exercise of the appointive and removal powers of the Secretary of Interior derived from "the primary source"—the Constitution—and unrestricted (as we have demonstrated) by statute, regulation, or executive order. See *supra,* pp. 11–19. The dismissal itself was fully valid, even though it was not authorized by the 1950 Act. Citing the incorrect authority for the removal cannot affect the operative act of removing petitioner—an act which is sustainable under the Secretary's untrammeled authority to dismiss one in

Board of the Civil Service Commission in violation of Executive Order 9835 (12 Fed. Reg. 1935).

petitioner's unprotected position. Perhaps, in officially terminating petitioner's employment, references to the 1950 Act, the Executive Order, and the security regulations should not have been made since they indicate that petitioner's removal was based upon considerations of national security; but where the authority to remove is clear, the validity of the removal should not now turn upon the initial references to the security program which have been expunged (see *infra*, pp. 23–25). As in *Harmon* v. *Brucker*, 355 U.S. 579, petitioner's real complaint is not with his separation from the federal service, but against the characterization of that removal; just as Harmon could not have prevented his discharge from the military service on any grounds deemed valid by the military authorities, so petitioner cannot set aside his effective removal from the federal service.[10]

We doubt, finally, that petitioner, unprotected by statute or regulation, is entitled to demand an affirma-

[10] *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, and *Perkins* v. *Elg*, 307 U.S. 325, upon which petitioner relies as requiring a contrary result (Pet. Br. 35), are inapposite. First, those cases involve different fields of the law in which the claimants had greater rights and protections than are accorded to government employees-at-will subject to summary dismissal. Second, the scope of judicial review in the area of federal employment is the much narrower one of whether the employee's removal was effected in compliance with applicable procedural limitations, if any, upon the discretionary removal power of the employing authority (*supra*, pp. 12–15). Third, as indicated in the text, the ground asserted for removing petitioner was a proper ground, on its face; the difficulty was that that ground may have become public, not that it was the basis of the removal action; but a valid dismissal of an employee-at-will does not become unlawful simply because a reason may have been improperly published.

tive showing that his removal was based, as a substantive matter, on rational grounds. But if an affirmatively rational basis is essential to the exercise of the Executive's constitutional power of removal (cf. R. 42–44), the judicial record in this case is sufficient to require that petitioner's removal be upheld. Based on the evidence before him, the Secretary of Interior was of the view that petitioner was of questionable reliability and trustworthiness and that petitioner had deliberately misrepresented, falsified or omitted material facts in response to inquiries by the Department of Interior (R. 5–6, 29–31). As noted by the court below, the "power of the Executive to discharge for untrustworthiness or deliberate misrepresentation is beyond dispute, even under the here inapplicable Lloyd-LaFollette and Veterans' Preference Acts" (R. 43). *Williams* v. *Cravens*, 210 F. 2d 874, 875 (C.A.D.C.), certiorari denied, *sub nom. Williams* v. *Robbins*, 348 U.S. 819; *Kohlberg* v. *Gray*, 207 F. 2d 35 (C.A.D.C.), certiorari denied, 346 U.S. 937.

II

PETITIONER IS NOT ENTITLED TO RELIEF BEYOND THAT WHICH HAS ALREADY BEEN EXTENDED TO HIM

Though we deny the invalidity of petitioner's removal and the authority of a court to set it aside, we have conceded (as indicated above) that the respondents erred in citing the 1950 Act and Executive Order 10450 as authority for his dismissal. In addition, the Civil Service Commission has expunged its records "of all adverse findings made with respect to [petitioner] under Executive Order 10450" (R. 34). And

petitioner's personnel records on file with the Department of Interior, as of September 1956, no longer refer to Executive Order 10450; petitioner's removal, insofar as the records indicate, was effected without stated reason or cause (R. 33–34). In the light of the Government's concession and this corrective administrative action which has been taken, petitioner has no present right to additional relief, judicial or otherwise. As stated by the court below (R. 44): "We think that this voluntary action by the Government is equivalent to the maximum relief a court might have been justified in granting under all the circumstances of the case. See *Peters* v. *Hobby*, 349 U.S. 331; 349 (1955); *Service* v. *Dulles*, 98 U.S. App. D.C. 268, 272, 235 F. 2d 215, 219 (1956), reversed on other grounds, 354 U.S. 363 (1957)." The record now stands without any indication that petitioner, an employee-at-will, was removed for security reasons, and certainly not on loyalty grounds. Cf. *Lerner* v. *Casey*, 357 U.S. 468, 478; *Beilan* v. *Board of Education*, 357 U.S. 399, 409–411.

Petitioner, however, continues to urge (Br. 32–34) that, in addition to the relief voluntarily accorded him, he is entitled to reinstatement in his former position. But since no procedural or substantive rights of petitioner were violated by his removal (as such) in 1954, there is no basis for invalidating his 1954 removal, and consequently there is no right to reinstatement. Cf. *Peters* v. *Hobby, supra; Cole* v. *Young*, 351 U.S. 536; *Service* v. *Dulles, supra; Lerner* v. *Casey, supra; Beilan* v. *Board of Education, supra.*

There is another reason for not reinstating peti-

tioner. Even if his 1954 discharge were held to be invalid, petitioner's employment was effectively and validly terminated in 1956 by reason of the "Notification of Personnel Action" (R. 33–34), issued by the Department of Interior, giving no reason for the termination. *Supra*, pp. 6, 23–24. The pertinent circumstances presented by this case are not materially different than those in *Peters* v. *Hobby*, 349 U.S. 331, where the Court held that "reinstatement * * * cannot be granted, since it appears that the term of petitioner's appointment would have expired on December 31, 1953, wholly apart from his removal on loyalty grounds." 349 U.S. at 349; cf. *Service* v. *Dulles*, 354 U.S. 363. It follows that petitioner cannot rightfully claim to be reinstated at this time.[11] To the extent that he may have been wronged by the terms of his original dismissal notice, clearly all proper and practical remedial measures, within reason and right, have now been accorded him.[12]

[11] There is a substantial question whether petitioner's employment was not for a two-year term, which has now expired. His employment agreement bound him to serve for that period or such part thereof as his services might be needed (R. 27). Petitioner's claim is that this agreement dealt merely with his right to have the Government pay his transportation back to the mainland, and that it did not put a term on his appointment (Pet. Br. 5). The courts below did not pass upon this issue, and therefore we do not press it here.

[12] While petitioner, in his complaint, sought back-pay from the time of his removal to the date of reinstatement, if that should be ordered by the court (R. 17), it is clear that the District Court is, in any event, without jurisdiction of this aspect of petitioner's claim. *Bruner* v. *United States*, 343 U.S. 112; 28 U.S.C. 1346(d)(2), 1491. Since he was properly dis-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted.

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MARCH 1959.

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missed (in our view), he is not entitled to back-pay. Cf. *Leiner* v. *United States*, Ct. Cls. No. 576–57, decided October 8, 1958 (granting back pay to an employee in petitioner's position who was reinstated after *Cole* v. *Young*).

APPENDIX

The Act of August 26, 1950 (64 Stat. 476–477, 5 U.S.C. 22–1, 22–3) provides, in pertinent part, as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U.S.C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, ~~Department~~ of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided,* That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any state-

ments or affidavits to the official designated by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head: *Provided further*, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such

person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

* * * * *

SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

* * * * *

EXECUTIVE ORDER 10450 [18 F.R. 2489, as amended]

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, *et seq.*); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118j); and the act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1, *et seq.*), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SEC. 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency

of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person oc-

cupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further,* that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency: *Provided*, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or

retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefore, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, seditionist, anarchist, or revolutionist, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to over-

throw the government of the United States or the alteration of the form of government of the United States by unconstitutional means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(8) Refusal by the individual, upon the ground of constitutional privilege against self-incrimination, to testify before a congressional committee regarding charges of his alleged disloyalty or other misconduct.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests of the national security, or information relating to any of the matters described in subdivisions (2) through (8) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and

agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board established by Executive Order No. 9835 of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted

upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed, and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of

representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United States or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, shall recommend means to correct any such deficiencies or tendencies, and shall inform the National Security Council immediately of any such deficiency which is deemed to be of major importance.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

(c) To assist the Civil Service Commission in discharging its responsibilities under this order, the head of each department and agency shall, as soon as possible and in no event later than ninety days after receipt of the final investigative report on a civilian officer or employee subject to a full field investigation under the provisions of this order, advise the

Commission as to the action taken with respect to such officer or employee. The information furnished by the heads of departments and agencies pursuant to this section shall be included in the reports which the Civil Service Commission is required to submit to the National Security Council in accordance with subsection (a) of this section. Such reports shall set forth any deficiencies on the part of the heads of departments and agencies in taking timely action under this order, and shall mention specifically any instances of noncompliance with this subsection.

SEC. 15. This order shall become effective thirty days after the date hereof.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE,

April 27, 1953.

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, November 9, 1953.

ORDER No. 2738

SUBJECT: SECURITY REGULATIONS

GENERAL

Sec. 1. Purpose.—(a) If the duly constituted Government and the national Security of the United States are to be protected and made secure, it is imperative that all persons engaged in any capacity in the departments and agencies of the Government shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States. This order is issued so that the Department of the Interior may have a program designed to insure that the personnel in its employment meet the minimum requirements considered

necessary to protect and make secure the Government and the national security.

(b) The regulations in this order are designed to achieve two objectives; first, to make sure that all employees are unquestionably and trustworthy in their capacity as citizens engaged in government activities conducted under our constitutional form of government, second, to guard security information or material, the disclosure of which, would have an adverse effect on national security.

(c) This order prescribes for all bureaus and offices of the Department the procedures, standards and criteria for carrying out these objectives and are issued in accordance with the act of August 26, 1950 (5 U.S.C. 1946 ed., Supp. V, secs. 22–1, 22–2, 22–3), and Executive Order 10450, of April 27, 1953 (18 F.R. 2489), as amended.

* * * * *

Sec. 3. Policy—(a) It shall be the policy of the Department, based on the act of August 26, 1950 (64 Stat. 476) and Executive Order No. 10450 of April 27, 1953, as amended, to employ and to retain in employment only those persons who are reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States in their capacity as citizens engaged in government activities conducted under the constitutional form of Government of the United States.

(b) No person shall be employed, or retained as an employee, in the department unless the employment of such person is clearly consistent with the interests of the national security.

* * * * *

Sec. 6. Security Investigations— * * *

* * * * *

(c) *Temporary and Intermittent Employees*—Certain employees in non-sensitive positions whose term of employment is for 6 months or less are, subject to the approval of the Civil Service Commission, exempted from the investigations normally required for non-sensitive positions. Special instructions will be issued concerning such employees by the Director of Security.

* * * * *

Sec. 13. Termination of Temporary and Probationary or Trial Employees—The regulations in this order are not intended to take away any authority which the appointing officer may have to terminate, for cause, temporary and probationary or trial employees.

Sec. 15. Notification to Employee of Suspension or Reassignment—(a) A written statement of charges shall be furnished the employee within 30 days after his suspension or temporary reassignment. The statement shall also inform the employee of his privileges under Sec. 16 and if appropriate Sec. 17 of this order. This statement shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit, and shall be subject to amendment within 30 days of issuance.

(b) A copy of these regulations shall accompany the statement furnished the employee. The text of Executive Order 10450 and the act of August 26, 1950, are included in these regulations as Appendix C and D respectively.

Sec. 16. Appeal Procedure—(a) An employee shall be afforded an opportunity to submit affidavits and statements and to answer such charges within 30 days after the receipt of the statement of such charges, or

within 30 days after the receipt of an amendment thereof.

(b) Statements in refutation of the charges and supporting documents shall be considered by the Security Legal Officer and the Director of Security, who shall make a joint recommendation to the Secretary for the disposition of the case. If the Security Legal Officer and Director of Security are in disagreement, individual recommendations shall be made by them.

(c) Final decision as to termination of the employee will be made by the Secretary.

(d) A written statement of the decision of the Secretary shall be furnished the employee.

(e) Copies of notices of all personnel actions taken in the case shall be supplied by the bureau or office to the Civil Service Commission.

Sec. 17. Further Appeal Rights—Permanent or Indefinite Employees—An employee who is suspended or temporarily reassigned and who is a citizen of the United States and has a permanent or indefinite appointment and has completed his probationary or trial period shall, if he requests, be given a hearing before a security hearing board, constituted and conducting hearings as provided in this order. The decision of the hearing board will be reviewed and considered by the Secretary before a determination is made with respect to the termination of the employee.

* * * * *

Sec. 21. Hearing Procedure—The following hearing procedure shall be strictly adhered to—(a) Hearings before security hearing boards shall be conducted in an orderly manner and shall be expedited as much as possible.

(b) Testimony before the hearing boards shall be given under oath or affirmation.

(c) The hearing board shall take whatever action is necessary to insure the employee of a full and fair consideration of his case. The employee shall be informed by the board of his right:

(1) To participate in the hearings;

(2) To be represented by counsel of his choice;

(3) To present witnesses and offer other evidence in his behalf and in refutation of the charges brought against him; and

(4) To cross-examine any witness offered in support of the charges.

* * * * *

(e) Both the Department and the employee may introduce such evidence as the hearing board may deem proper in the particular case. Rules of evidence shall not be binding on the board, but reasonable restrictions shall be imposed as to relevancy, competency, and materiality of matters considered, so that the hearings shall not be unduly prolonged. If the employee is or may be handicapped by the nondisclosure to him of confidential information or by lack of opportunity to cross-examine confidential informants, the hearing board shall take that fact into consideration. If a person who has made charges against the employee and who is not a confidential informant is called as a witness but does not appear and refuses either to permit his deposition to be taken or to answer written interrogatories, his action in this regard shall be considered by the board in evaluating such charges.

* * * * *

(i) Hearing boards shall conduct the hearing proceedings in such manner as to protect from disclosure

information affecting the national security or tending to disclose or compromise investigative sources or methods.

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(k) The board shall reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession. The conclusions and recommendations of the Board with respect to the employee against whom the charges have been made should specifically include a recommendation that the services of the employee be terminated or that termination is not warranted. The board, in making its determination, shall take into consideration the inability of the employee to meet charges of which he has not been advised because of security reasons, specifically or in detail, or to attack the credibility of witnesses who do not appear. The recommendations of the board shall be in writing and shall be signed by a majority of the members of the board. The recommendations of the board, and the complete record of the case, including investigative reports, shall be sent to the Secretary for use in his final review of the case.

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Sec. 22. Revocations—This order supersedes all previous Departmental security regulations and Secretarial Orders Nos. 2308, as amended, 2459, 2460, 2488, 2489, 2490, as amended, 2491, 2538, and sections 6 and 7 of 2309, as amended.

/s/ DOUGLAS MCKAY,
Secretary of the Interior.

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